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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JACQUELINE WALKER,
Appellant,

vs.

CITY OF WARREN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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103 pp

IN THE SUPREME COURT OF THE UNITED STATES

JACQUELINE WALKER,

Appellant,

-vs- No. _____

CITY OF WARREN,

Appellee.

_____/

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

I. Are the classifications made by the age restriction provision invidious and irrational and thus violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

II. Does Ordinance 30, Sec. 3-505 infringe, without compelling reason, the fundamental rights of expression and association in violation of both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United

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OPINION BELOW

The opinion of the Court of Appeals of Michigan is reported. The citations are: People v Walker, 135 MichApp 267, 354 NW2d 312 (1984).

JURISDICTION

The Appellant was convicted of violating Ordinance Sec. 3-505 (1) of the City of Warren, Michigan.

The date of the entry of the order of the Supreme Court of Michigan, which is sought to be reviewed by appeal, was February 14, 1985.

The Notice of Appeal in this case was filed on May 14, 1985 in the Supreme Court of Michigan.

The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U.S.C. § 1257 (2).

A case believed to sustain jurisdiction is Erznoznik v. City of Jacksonville, Fla., 422 US 205, 45 L Ed 2d 125, 95 S Ct 2268 (1975).

CONSTITUTIONAL PROVISIONS, STATUTE AND ORDINANCES INVOLVED

U.S. Constitution, Amend 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

dom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amend 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1257 (2)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

City of Warren Ordinance No. 30, Sec. 3-505

Prohibitions and restrictions. -- (1) It shall be unlawful for any licensee, employee, agent or servant of the licensee to permit a minor prior to his (her) 17th birthday to enter, loiter, remain, congregate, or play any

any mechanical amusement in an amusement machine center unless accompanied by a parent or guardian.

(2) Nothing herein contained shall be construed as permitting the issuance of a license for any slot machine or as legalizing any coin-operated machine or device in which is incorporated any gambling feature, and all use thereof for gambling of any kind is prohibited.

(3) It is unlawful for any person holding a license under this chapter to permit the operation of a device, as defined in Section 3-501, between the hours of 2:00 a.m. and 6:00 a.m.

(4) Nothing in this chapter shall be construed as prohibiting the keeping and use of pool tables, billiard tables, bowling alleys, shuffle boards or other licensed amusements and their usual appurtenances in places duly licensed and operated under applicable ordinances of the city.

STATEMENT OF THE CASE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs-

No. 79-1143 AR
37th District Court
No. 302 226 (900007)

JACQUELINE WALKER,

Defendant-Appellant.

_____/

SETTLED AND CERTIFIED STATEMENT OF THE PROCEEDINGS AND FACTS

Entered on July 14, 1980

Present: HON. JOHN G. ROSKOPP, Circuit Judge

I hereby settle and certify the following statement of the proceedings and facts in this cause:

Appellant was named in a traffic citation complaint with the charged violation of Sec. 3-505, namely, with "Allowing minor to operate mechanical machines".

On or about June 27, 1979, Appellant filed with the 37th District Court of the State of

Michigan her Motion to Dismiss with Prejudice this case and two others not involved in this Application for Leave to Appeal, together with her Brief in Support of Motion to Dismiss with Prejudice and noticed the same for hearing on July 2, 1979. The hearing of the motion was then adjourned by stipulation to July 9, 1979, and then to July 13, 1979, and was heard and denied by the 37th District Court, by the Honorable Don Binkowski, District Court Judge, on July 20, 1979.

On or about August 6, 1979, Appellant filed with the Circuit Court for the County of Macomb her Motion for Leave to Appeal from the District Court's denial of her Motion to Dismiss with Prejudice and noticed the same for hearing on Monday, August 20, 1979.

On August 20, 1979, Appellant's Motion for Leave to Appeal was denied by the Circuit Court for the County of Macomb, by the Honorable Robert J. Chrzanowski, a Judge of that Court, no reason or ground being expressed in support of such denial and none appearing

in an order prepared by Appellee's counsel, approved by the undersigned counsel and mailed to Appellee's counsel on August 21, 1979.

On August 20, 1979, Appellant filed with this Court her Motion for Immediate Consideration, Emergency Application for Leave to Appeal and Motion for Stay of Proceedings.

By order certified on September 20, 1979, this Court granted the Motion for Immediate Consideration, and denied the Emergency Application for Leave to Appeal " * * * for failure to persuade the court of the need for immediate appellate review." The same order also denied Appellant's motion for stay of proceedings.

On or about September 21, 1979, Appellant filed with the Supreme Court of Michigan her Motion for Immediate Consideration, Emergency Application for Leave to Appeal and Motion for Stay of Proceedings.

By order certified on September 25, 1979, the Supreme Court of Michigan granted the Motion for Immediate Consideration, and denied

the Emergency Application for Leave to Appeal for the reason that " * * * the Court is not persuaded that the questions presented should now be reviewed by the Court. The motion for stay becomes thereby moot, and it is DENIED."

On September 25, 1979, Appellant filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division, naming as Respondent therein, the Hon. Binkowski, Judge of the 37th Judicial District Court of the State of Michigan.

On October 18, 1979, the United States District Court for the Eastern District of Michigan, Southern Division, by the Honorable Thomas P. Thornton, United States District Judge, issued an order denying Appellant's application for a writ of habeas corpus.

On October 19, 1979, Appellant renewed her previously filed, argued and denied, Motion to Dismiss with Prejudice before the 37th District Court, and the same was again denied by that Court, by the Honorable Don Binkowski, Judge

of that Court. Following this denial, Appellant was found guilty in a non-jury trial by Judge Binkowski at which the following transpired:

On January 18, 1979, Officer Bretz and Perkola were on patrol and drove past Walker's Pinball Arcade. They noticed some children who appeared to be very young, ages 10 to 14 years old playing pinball machines. They stopped and went into the Pinball Arcade and talked to the children. The children were not accompanied by their parents and were under age, so they issued a citation to the defendant. (P. 5-6)

Karen Buza of Madison Heights testified that she was in Walker's Pinball Palace with Andrea Allen on January 18, 1979. At that time, she was twelve years old and in the seventh grade. She was playing the pinball machine, which costs a quarter to play. They were playing for one-half hour. (R 7, 8, 9) The policemen came in and asked them their age.

Andrea Allen of Madison Heights testified

she was born on October 25, 1965 (age twelve) and was in the seventh grade on the date in question. She was playing a pinball machine. She saw Mrs. Walker there when the police arrived. The police inquired of her in regard to her age. (R 12-13)

Mrs. Beverly Buza, testified that she was the mother of Karen Buza. Karen was born May 26, 1966. Mrs. Buza was not in the company of her daughter on the evening on January 18, 1979 at Walker's Pinball Palace and she did not give her daughter any written permission to go to Walker's Pinball Palace. (R 14-15)

Brian Hurst of Detroit testified he was in Walker's Pinball Palace during the evening of January 18, 1979. He was born on September 1, 1966, (age 12) and was in the seventh grade in January 1979. He went with his brother David Hurst at about 6:00 p.m. He was playing the pinball machine for about two hours. He knows Mrs. Walker because she made change for him. His mother dropped him off at the Walker

Pinball Palace. His mother was not with him. (R 17-18)

David Hurst of Detroit, Michigan testified he was 14 years old and was born March 18, 1965, (age 13) and he was now, (at the time of trial) in the ninth grade. He was in the establishment for two hours playing the pinball machines. He knows Mrs. Walker because she sits at the counter and sometimes gives him change. Once Mrs. Walker asked him "How old he was?" and he told her. She said that he had to have his parents accompany him. (R 20, 21, 22)

Mrs. Rosa Hurst of Detroit testified that David Hurst, her son was born on March 18, 1965 and Brian Hurst, her son, was born on September 1, 1965. On January 18, 1979 she dropped both of her sons off to go to Walker's Pinball Palace. She was not familiar with the ordinance requirements. She did not give written permission, but gave oral permission for her boys to play the pinball machines. (R 23, 24, 25)

Jeffrey Anderson testified he lived in Warren, and was seventeen years old. He was born on January 29, 1962 and was a senior in high school. He went to Walker's Pinball with Fritz Upholl. He was playing the pinball machines for fifteen to twenty minutes when the police arrived. He was not accompanied by his parent or guardian. He knows Mrs. Walker because she makes change and checks the machines when they do not work properly. He had been at Walker's eight to ten times previously. They never inquired about his age. (R 26-27)

Police Officer Perkola testified that on January 18, 1979 at approximately 6:50 p.m. while on patrol he observed through the front windows several minors operating the pinball machines. He entered the establishment and asked for I.D. from the minors to establish their age. He then gave Mrs. Walker a citation for violation of the city ordinance.

The Court found the defendant guilty and assessed a fine and costs of $500.00.

Also on October 19, 1979, Appellant filed with the United States District Court for the Eastern District of Michigan, Southern Division, her Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the Order Denying Writ of Habeas Corpus entered on October 18, 1979, above referred to. The appeal in the Sixth Circuit Court of Appeals is still pending.

Also on October 19, 1979, Appellant mailed to the Circuit Court for the County of Macomb her Claim of Appeal in this cause.

By order dated November 2, 1979, the United States District Court for the Eastern District of Michigan, Southern Division, by the Honorable Thomas P. Thornton, United States District Judge, denied the issuance of a certificate of probable cause.

Subsequently, briefs were filed by both parties in the Circuit Court for the County of Macomb and on April 28, 1980, oral argument was held by both parties hereto before the Honorable John G. Roskopp, Circuit Judge of that Court.

On May 7, 1980, Judge Roskopp issued his written opinion and Order Affirming Conviction, copies of which are hereto attached.

On May 27, 1980, Appellant filed with the lower Court her Motion for Rehearing of Order Affirming Conviction and noticed the same for hearing on June 2, 1980 before Judge Roskopp.

On June 2, 1980, following argument by counsel, Judge Roskopp denied Appellant's motion and an Order Denying Motion for Reconsideration, a copy of which is hereto attached, was entered on June 5, 1980.

/S/ John G. Roskopp
Hon. John G. Roskopp
Circuit Judge

On April 3, 1981, the Court of Appeals of Michigan denied Appellant's application for leave to appeal for lack of merit in the grounds presented.

On December 22, 1981, the Supreme Court of Michigan, in lieu of granting Appellant's application for leave to appeal, remanded the case to the Court of Appeals of Michigan for

consideration as on leave granted.

On June 23, 1982, the United States Court of Appeals for the Sixth Circuit denied the certificate of probable cause.

On July 21, 1982, the Court of Appeals of Michigan granted Appellant's motion to permit new grounds for appeal. The new grounds were the Questions Presented in the instant appeal.

On June 18, 1984, the Court of Appeals of Michigan rendered its opinion and order affirming the Appellant's conviction.

On February 14, 1985, the Supreme Court of Michigan denied Appellant's application for leave to appeal.

REASONS FOR PLENARY CONSIDERATION

I.

THE CLASSIFICATIONS MADE BY THE AGE RESTRICTION PROVISION ARE INVIDIOUS AND IRRATIONAL AND THUS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Ordinance 30, Sec 3-505 of the City of Warren violates the equal protection clause of the Fourteenth Amendment. This is so whether this Court applies the test of rational relationship of the classification to a legitimate state purpose or the strict scrutiny test applicable when a fundamental right is involved.

In the rational relationship test, the relevant relationship is, of course, between the classification and the legislative purpose, see, e.g., Massachusetts Board of Retirement v Murgia, 427 US 307, 312, 49 L Ed 2d 520, 524, 96 S Ct 2562 (1976) and not between the restriction and the purpose. The ordinance makes two classifications that are pertinent here:

(1) between licensees, employees, agents or servants of the licensees and the licensees of coin-operated amusement centers, on the one hand, and the same category of persons of other commercial amusement establishments, on the other hand, and (2) between persons under seventeen and persons seventeen and over.

The classifications made by the ordinance are irrational and arbitrary, and fail to advance the city's purported goals. Two rational basis decisions of the last decade in which the Court invalidated statutes are pertinent here. United States Department of Agriculture v Moreno, 413 US 528, 37 L Ed 2d 782, 93 S Ct 2821 (1973), held that a classification that denied food stamp eligibility to households whose members were not "all related to one another" did not bear a rational relationship to, inter alia, "the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program." 413 US at 535-38 Jiminez v Weinberger, 417 US 628, 41 L Ed 2d 363, 94 S Ct 2496 (1974), held that

a classification determining dependency and hence entitlement under the Social Security Act for disability insurance benefits between two classes of illegitimates born after the parent's disability was not reasonably related to the asserted governmental purpose of preventing spurious claims. 417 US at 635-37. In both of these cases, the Court was willing to consider whether the classification had any realistic relationship to the legitimate purpose. If Moreno and Jiminez, supra, are still viable, the same question should be asked and answered here.

The age restriction improperly draws a distinction between the licensees and personnel of coin-operated games centers and all other amusements which are not coin-operated. Cf Jiminez, supra, at 637.

There is no rational basis for concluding that gambling, narcotics sales, truancy, or spending lunch money, begged, borrowed, robbed or stolen, occur in connection with the playing of coin-operated games more frequently than with other commercial games and amuse-

ments, such as bowling alleys, miniature golf establishments, and carnivals. These commercial amusements share the same clientele, are readily accessible to youths under seventeen, and are within their typical budget. The owners and operators of these other games and devices, which are not subject to the age restriction, are situated identically, so far as the purported purposes of the age restriction are concerned, to owners of coin-operated games. See, e.g., People v Palazzolo, 62 Mich App 140, 146, 147, 233 NW2d 216, 220 (1975).

Moreover, the distinction between youths under seventeen and those seventeen and over is irrational because the restriction on the former class fails to further the purported legislative purposes. See United States Department of Agriculature v Moreno, 413 US at 537, supra.

Furthermore, a child under seventeen may not play a game even if he is accompanied by a grandparent or by a parent of a friend.

The age restriction is also irrationally

over-inclusive: it prohibits the under seventeen year olds from playing the games when school is not in session, when it can have no relationship to truancy.

In Alladin's Castle, Inc v City of Mesquite, 630 F2d 1029, 1033, 1038, 1039, 1040 (CA 5, 1980), reh and reh en banc den, reversed in part and remanded for further proceedings, 455 US 283, 71 L Ed 2d 152, 102 S Ct 1070 (1982), the City's ordinance, No. 1103, provided, as follows:

> "It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian."

(630 F2d at 1033)

The Court in Alladin's Castle, Inc., supra, stated its holding, as follows:

> " * * * We cannot say with the district court that the ordinance's rational basis is 'incredibly slender.' Rather, the ordinance is 'arbitrary and irrational.' Lindsey v. Normet, 405 U.S. 56, 79, 92

> S.Ct. 862, 877, 31 L.Ed.2d 36 (1972).. We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law."

In City of Mesquite v Alladin's Castle, Inc, this Court held, as follows:

> " * * * If Texas law provides independent support for the Court of Appeals judgment, there is no need for decision of the federal issue. On the other hand, if the City is correct in suggesting that the Court of Appeals' interpretation of state law is dependent on its federal analysis, that court can so advise us and we can then discharge our responsibilities free of concern that we may be unnecessarily reaching out to decide a novel constitutional question.
>
> The judgment of the Court of Appeals is reversed in part and the case is remanded for further proceedings consistent with this opinion."

(71 L Ed 2d at 164)

The Fifth Circuit, in Alladin's Castle, supra, discussed truancy, as follows:

> "The decision to bar all

people under seventeen years of age, whether or not they are required to be in a school (Citation omitted) from all coin-operated amusement centers at all times is patently irrational. See, e.g., Stanley v. Illinois, 405 U.S. at 652-659, 92 S.Ct. at 1213-1216. Barring young people from using coin-operated amusement devices at times and on days when school is closed simply bears no relation whatever to the city's alleged interest in eliminating truancy. See Eisenstadt v. Baird, 405 U.S. at 447-52, 92 S.Ct. at 1035-1037 (contrived purpose evidenced by irrationality). The regulation instead evidences the city's disapproval of such centers in general or of Alladin's owners in particular. See Orr v. Orr, 440 U.S. 268, 280 n. 10, 99 S.Ct. 1102, 1112, n. 10, 59 L.Ed.2d 306 (1979). Such disapproval may justify private action, but mere disapproval is not enough constitutionally to justify bringing the full weight of the municipality's regulatory apparatus into play.

By the same token, the regulation denies Alladin's equal protection of the laws. Just as the 'all hours' restriction is grossly overinclusive, the limitation of that restriction to coin-operated amusement centers is equally underinclusive. Before such centers existed, children found places and opportunities for truancy, and they would

> find places were such centers to become extinct. Singling out coin-operated amusement centers from all other establishments is an act of discrimination, not policy.
>
> Traditional equal protection analysis does not require that every classification be drawn with precise "'mathematical nicety'" . . . But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis. United States Department of Agriculture v. Moreno, 413 U.S. at 538, 93 S.Ct. at 2827 (citation omitted)."

Appellee would justify the age restriction on the basis that it contributes generally to the health, welfare and morals of its citizens. Appellant submits that this represents nothing more than a value judgment about the relative benefits of coin-operated amusement games in the City of Warren, Michigan. The provision clearly has nothing to do with health, and Appellant is not aware of any case in which this Court has upheld a classification on the sole ground that it somehow contributes to general welfare and morals in some subjective, unarticulated way. Village of

Belle Terre v Borass, 416 US 1, 39 L Ed 2d 797, 94 S Ct 1536 (1974), is not such a case. There, the Court upheld a zoning ordinance limiting land use to one-family dwellings, and defining the word 'family' to preclude occupancy by more than two unrelated persons. While the Court referred to general considerations of 'family values' and 'youth values,' it specifically observed that the zoning restriction was rationally designed to alleviate concrete 'urban problems' of lack of space, traffic congestion, and excessive noise. 416 US at 9. Belle Terre, supra, cannot stand for the proposition that the desire to protect moral values cures the constitutional defect in an arbitrary and irrational legislative classification.

In summary, the age restriction makes arbitrary classifications bearing no rational relationship to the ordinance's purported purposes. Several state courts that have addressed restrictions on coin-operated games have correctly held that they violate the equal protection clause of the Fourteenth

Amendment. Cossack v City of Los Angeles, 11 Cal 3d 726, 734, 523 P2d 260, 265, 114 Cal Rptr 460, 465 (1974); State v Bloss, 613 P2d 354, 358-61 (Hawaii 1980); People v Palazzolo, 62 MichApp 140, 146-47, 233 NW2d 216, 220 (1975). This Court should reach the same result.

The Fifth Circuit, in Alladin's Castle, Inc., supra addresses the question squarely:

> "Exposure to Corrupting Influences
>
> The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person 'who would promote gambling, [the] sale of narcotics and other unlawful activities' while in a coin-operated amusement center in Mesquite. The district court recognized, as we do, that the city presented no evidence that such people ever come to these centers. Initially, therefore, we note that the city failed to demonstrate any need which would give rise to an interest in protecting its young citizens form corrupt influences in amusement centers.
>
> If such people do go to the centers, there is no ev-

idence that they are drawn by the machines. They are instead drawn by the presence of those whom they perceive of as potential victims. The city did not show that barring children from these centers would in any way stop these people from associating with children. Logic indicates that they would merely follow the barred children to other places of congregation such as the schoolyard, the nearby street corner, the movies, the local fast food establishment, the parking lot, the concert, the park, or the beach. The city's regulation thus does not even further its stated goal of protecting minors from exposure to malefactors. Cf., Eisenstadt v. Baird, 405 U.S. at 442 n.3, 92 S.Ct. at 1033 n.3 (legislation'has no deterrent effect'). Mesquite's goal of keeping minors from being exposed to undesirable people could not, therefore, be served by an absolute ban on access to coin-operated amusement centers, unless such a ban were accompanied by bans on access to every other place of congregation. Certainly such an approach would impermissibly destroy freedom. If a malefactor is to be precluded from malefaction, the city must bar the act or must seek to educate potential victims and perpetrators. Whitney v.

California, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

II.

ORDINANCE 30, SEC 3-505 INFRINGES, WITHOUT COMPELLING REASON, THE FUNDAMENTAL RIGHTS OF EXPRESSION AND ASSOCIATION IN VIOLATION OF BOTH THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The ordinance also abridges fundamental personal rights of expression and association, and cannot survive the strict scrutiny by which such a regulation must be tested. The right of Appellant to assert the rights of third persons who are affected by the ordinance is beyond challenge. Carey v Population Services International, 431 US 678, 683, 684, 53 L Ed 2d 675, 97 S Ct 2010 (1977), Craig v Boren, 429 US 190, 192-197, 50 L Ed 2d 397, 97 S Ct 451, reh den 429 US 1124, 51 L Ed 2d 574, 97 S Ct 1161 (1976), Gooding v Wilson, 405 US 518, 520, 521, 31, L Ed 2d 408, 92 S Ct 1103 (1972), Dombrowski v Pfister, 380 US 479, 486, 487, 14 L Ed 2d 22, 85 S Ct 1116 (1965).

The First Amendment's broad protection of free speech guarantees an individual's right of self-expression and right to receive others' expressions and ideas. Seee, e.g., First National Bank v Bellotti, 435 US 765, 777 fn 12, 55 L Ed 2d 707, 98 S Ct 1407, reh den (US), 57 L Ed 2d 1150, 98 S Ct 3126 (1978), Kleindienst v Mandel, 408 US 753, 762, 763, 33 L Ed 2d 683, 92 S Ct 2576 (1972). See Tushnet, Free Expression and the Young Adult: A Constitutional Framework, 1976 U Ill L F 746, 752, 753. Because entertainment is a form of communication and expression, this First Amendment protection extends to it in its many forms. Schad v Borough of Mt Ephraim, 101 S Ct 2176, 2181 (1981); Zacchini v Scripps Howard Broadcasting Co, 433 US 562, 578, 53 L Ed ¶d 965, 97 S Ct 2849 (1977). Certainly, when the scope of coverage extends to expressive entertainment on the very periphery of the First Amendment, such as the nude dancing involved in the Mt. Ephraim case, supra, coin operated games are entitled to no

less protection.

And even coin-operated video or motion picture 'peep shows' have been held entitled to constitutional protection. People v Glaze, 27 Cal 3rd 841, 614 P2d 291, 166 Cal Rptr 859 (1980). See also 414 Theatre Corp v Murphy, 360 F Supp 34 (DC - SDNY, 1973), aff'd, 499 F2d 1155 1155 (CA 2, 1974).

Coin-operated games, as a legal and creative form of entertainment and expression, are not constitutionally distinguishable from other similarly legitimate means of entertainment. The rights to enjoy these games and to author and distribute them should be entitled to a broad measure of constitutional protection. Restricting access of others to the games is an interference with the First Amendment right of expression of the author, and the First Amendment right of the manufacturer and seller and of Appellant's to publish the author's expression.

The restriction here is also an interference with minors' First Amendment rights.

One of these rights is to benefit from exposure to the creative expression the games convey. See Red Lion Broadcasting Co v FCC, 395 US 367, 389, 390, 23 L Ed 2d 371, 89 S Ct 1794 (1969); Stanley v Georgia, 394 US 557, 564, 22 L Ed 2d 542, 89 S Ct 1243 (1969). Another is to enjoy, as a participant in the game, the self-expression for which the game provides an effective medium. The player matches his wits and reflexes against those programmed into the game. Mastery of these games requires the development of skill and the exercise of a high degree of concentration. See Cossack v City of Los Angeles, 11 Cal 3d 726, 523 P2d 260, 114 Cal Rptr 460 (1974); WNEK Vending & Amusements Co v City of Buffalo, 107 Misc 2d 353, 434 NYS2d 608 (1980).

In the premium that the games place on skill and concentration, they are fundamentally the same as athletic or semi-athletic games such as archery, horseshoes and shuffleboard, see e.g., Cossack v City of Los Angeles, supra, 11 Cal 3d at 735, 523 P2d at 266, 114 Cal Rptr at 466, and non-athletic games such as bridge.

In games, as in artistic pursuits such as painting or ballet, the participant derives pleasure and satisfaction commensurate with his skill and talent. These activities, although non-verbal, are means of individual expression.

As games of skill, coin-operated amusement games are also vehicles for competition, which is another kind of self-expression for the participants. Whether the competition occurs informally at an amusement center or as part of an organized contest, it provides a player with an opportunity to express his individuality by competing and communicating with others with similar interests. A competition in New York on a video game sponsored by the game's distributor attracted over 4,000 entrants. See WNEK Vending Amusements Co v City of Buffalo, 107 Misc 2d 353, 434 NYS2d 608, 617 (1980).

This Court has rejected the notion that the level of protection given any expression turns on its importance or social utility.

Cohen v California, 403 US 15, 24-26, 29 L Ed 2d 284, 91 S Ct 1780, reh den 404 US 876, 30 L 2d 124, 92 S Ct 26 (1971); NAACP v Button, 371 US 415, 444-45, 9 L Ed 2d 405, 83 S Ct 328 (1963). The protection given a constitutionally protected right does not vary with the value judgments made by legislative bodies as to the signficance of the right.

The age restriction is designed to prevent congregation of youthful patrons. This is accomplished, not by a direct prohibition against congregating, but by prohibiting youths from playing the games unless accompanied by a parent or guardian and thereby discouraging them from coming to the game center. The games are simply the reason for the congregating that the ordinance seeks to prevent. The ordinance is thus designed to interfere with the First Amendment right of association. A regulation neutral on its face is subject to constitutional challenge if adopted for an impermissible purpose. Washington v Davis, 426 US 229, 241, 48 L Ed 2d 597, 96 S Ct 2040

(1976). And the aggrieved party need not prove that the impermissible purpose was the sole motivation for the legislative act. Arlington Heights, supra, permits a plaintiff to pierce the facial validity of a legislative act to prove that one of the purposes of the act is impermissible. In the case at bar, the ordinance was clearly aimed at discouraging associational conduct.

While this Court has not expressly decided the point, it has assumed that a right of social association exists. See Gilmore v City of Montgomery, 417 US 556, 575, 41 L Ed 2d 304, 94 S Ct 2416 (1974); Coates v City of Cincinnati, 402 US 611, 615, 616, 29 L Ed 2d 214, 91 S Ct 1686 (1971). Association for social purposes should be entitled to the same protection as association for political or other purposes. The language of the First Amendment does not restrict the purposes to which the right applies. The right of expression extends to entertainment contexts and there is no reason the right of social association should not have the same scope.

Speaking of associational rights, this Court has said, "'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stilted by more subtle governmental interference.'" Healy v James, 408 US 169, 183, 33 L Ed 2d 266, 92 S Ct 2338 (1972) quoting Bates v City of Little Rock, 361 US 516, 523, 4 L Ed 2d 480, 80 S Ct 412 (1960). In Healy, officials of a state college denied official school recognition to the local chapter of Students for a Democratic Society (SDS) because the published aims of the national SDS chapter included disruption and violence. The school contended that, although nonrecognition prevented the group from using various campus facilities, it did not abridge the group's associational rights. The Court disagreed, holding that the disabilities imposed constituted an impermissible infringement of these rights. See also Familias Unidas v Briscoe, 619 F2d 391 (CA 5, 1980) (statute empowering judge to exact disclosure of membership lists of groups interfering with school

operations violates right of association); Gay Students Organization v Bonner, 509 F2d 652 (CA 1, 1974) (prohibiting organization from holding social activities on campus held to deny members of the organization their associational rights).

The City of Warren may, of course, seek to eliminate the problems of truancy and exposure of youth to illegal activities by attacking those problems directly, For example, in combating truancy, the city could simply prohibit minors from playing the games during school hours. And, " * * * Activities such as gambling with children or selling them drugs can be criminalized and vigorously prosecuted." Alladin's Castle, Inc, supra, at 1042. It is manifest, however, that the city may not inhibit the lawful gathering of citizens on the theory that the gathering may lead to unlawful conduct. See, e.g., Sawyer v Sandstrom, 615 F2d 311, 318 (CA 5, 1980)

Minors " * * * are possessed of fundamental rights which the State must respect."

Tinker v Des Moines Independent Community School District, 393 US 503, 511, 21 L Ed 2d 731, 89 S Ct 733 (1969). Accord, Planned Parenthood v Danforth, 428 US 52, 74, 49 L Ed 2d 788, 96 S Ct 2831 (1976). "A child, merely on account of his minority, is not beyond the protection of the Constitution." Bellotti v Baird, 443 US 622, 633, 61 L Ed 2d 797, 99 S Ct 3035, reh den (US) 62 L Ed 2d 121, 100 S Ct 185 (1979) (plurality opinion by Powell, J).

To be sure, in certain limited circumstances, "the state may have greater power to regulate conduct that is otherwise constitutionally protected if the regulation applies only to children, * * * ". Alladin's Castle, Inc., supra, at 1042. This limited right to restrain minors in a way that would be unconstitutional if applied to adults stems from

> " * * * the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."

(Bellotti v Baird, supra, 443 US at 634)

The special circumstances of youth, however, cannot be invoked to justify all restrictions on minors' constitutional rights. See, e.g., Planned Parenthood v Danforth, supra; Goss v Lopez, 419 US 565, 42 L Ed 2d 725, 95 S Ct 729 (1975). This Court has been especially reluctant to permit the infringement of minor's rights in the area of First Amendment freedoms. See Tinker v Des Moines Independent Community School District, supra; West Virginia State Board of Education v Barnette, 319 US 624, 87 L Ed 1628 (1942). Thus, although a different standard of obscenity is appropriate for minors, Ginsberg v New York, 390 US 629, 638, 20 L Ed 2d 195, 88 S Ct 1274, reh den 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968), "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v City of Jacksonville, 422 US 205, 213, 214, 45 L Ed 2d 125, 95 S Ct 2268 (1975). The First Amendment right of freedom of association for a

lawful purpose is entitled to similar protection.

In this case, none of the conditions precedent for applying the lesser measure of constitutional protection obtain. Neither the playing of amusement games nor the congregation of minors at amusement centers present dangers unique to minors. Neither playing coin-operated games nor congregating with one's peers involves minors in the making of a critical decision requiring state guidance. Minors who can decide to participate in political debate, Tinker v Des Moines Independent Community School District, supra, and to obtain an abortion, Planned Parenthood v Danforth, supra, can certainly decide without state input whether to visit these centers or to spend a quarter on a game.

Finally, the ordinance cannot be justified as an attempt to assist parents in the upbringing of their children. The ordinance, in fact, has the opposite effect by burdening parents and usurping their primary role in child-rearing. See Wisconsin v Yoder, 406 US

205, 32 L Ed 2d 15, 92 S Ct 1526 (1972). Unlike parents in New York who could avoid the restriction on sales to minors by themselves simply buying the magazines for their children, Ginsberg v New York, supra, 390 US at 639, parents who decide to permit their children to enter and play at these amusement centers now must accompany their children on each visit. If a parent has no objection to the child visiting the centers and playing the games unescorted, the state has no right to overrule that decision.

The unjustified abridgement of First Amendment rights is an independent ground for holding the ordinance invalid without reference to an equal protection analysis, In addition, that abridgement makes the strict scrutiny test for equal protection applicable. Under that test, the classification based on age can stand only if it serves a compelling state interest and is no more restrictive than is necessary to protect that interest. Memorial Hospital v Maricopa County, 415 US 250,

269, 39 L Ed 2d 306, 94 S Ct 1076 (1974). The discussion, supra, of the interests purportedly served demonstrates that the ordinance cannot meet the strict scrutiny test.

The foregoing contentions find support in Aladdin's Castle, Inc v Mesquite, supra, 630 F2d 1029, 1041 - 1044 (CA 5, 1980), wherein the Court stated, in material part, as follows:

"2. Strict Scrutiny

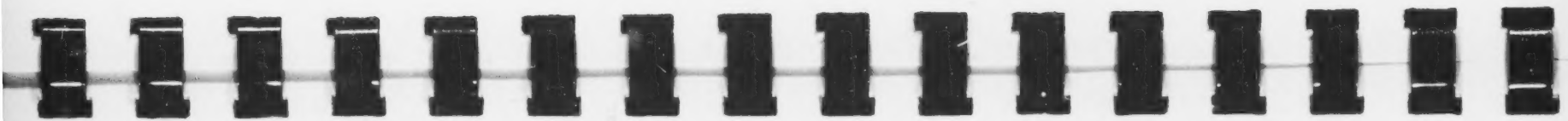
> Even if the challenged ordinance had a rational basis and a legitimate purpose, we would nevertheless be compelled to strike it down. The challenged age restriction impermissibly trammels fundamental personal rights. By its actions, Mesquite has denied individuals under seventeen years of age their liberty interests in association. Since this denial neither furthers 'a sufficiently important interest [nor] employs means closely drawn to avoid unnecessary abridgement of associational freedoms.' Buckley v. Valeo, 424 U.S. 1, 25, 96 S. Ct. 612, 637, 46 L.Ed. 2d 659 (1976), the ordinance is unconstitutional. (p 1041)
>
> (a) Association
>
> The right of association is fundamental. See, e.g., Richmond Newspapers Inc v. Virginia, ____U.S.____, 100 S Ct. 2814, 2829, 65 L.Ed.2d 973 (1980)

(plurality opinion); NAACP v. Button, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); Sotto v. Wainwright, 601 F.2d 184, 191 (5th Cir. 1979), cert. denied, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980). The right to associate freely and 'to go where one pleases' is a protected freedom under the first amendment and a substantive guarantee of fourteenth amendment due process. Sawyer v. Sandstrom, 615 F.2d at 316 (quoting Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D.Pa. 1975), aff'd 535 F.2d 1245 (3rd Cir.), cert denied, 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976); see Sotto v. Wainwright, 601 F.2d at 190-91. The right of free association protects associational activities directed at a plethora of ends * * * ."

(p 1041)

The Court further stated, as follows:

"Restraining association is therefore not a legitimate governmental purpose, absent a compelling state interest to warrant such restraint. Regulations affecting fundamental rights of association, but aimed at non-associational evils, are allowable under certain circumstances. To be constitutional, however, the regulation must at least be nondiscriminatory, must not 'unnecessarily burden or restrict constitutionally protected activity,' Dunn v. Blumstein, 405



U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972), must be drawn with '[p]recision,' NAACP v. Button, 371 U.S. at 438, 83 S.Ct. at 340, must be 'tailored,' Shapiro v. Thompson, 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969), to accomplish its legitimate objectives, and must not be the most restrictive method of regulation if other, 'less drastic means' are available, Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

(b) Regulation of Minors

We do not doubt that the state may have a legitimate interest in protecting young people from certain unhealthy influences. Yet 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed.2d 325 (1964); Sawyer v Sandstrom, 615 F.2d at 316 (association as one such protected freedom.)

Mesquite's interest in shielding young people from undesireable influences may be achieved in other ways. Activities such as gambling with children or selling them drugs can be criminalized and vigorously prosecuted.

The ordinance before us, however sweeps too broadly and cannot be justified under our Constitution. '[T]he deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.' Whitney v. California, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

The standard that the ordinance must meet is not reduced because minors are involved. 'A child, merely on account of his minority, is not beyond the protection of the Constitution.' Bellotti v. Baird, 443 U.S. 622, 633, 99 S. Ct. 3035, 3043, 61 L.Ed.2d 797 (1979) (Powell, J., joined by Burger, C.J. and Stewart and Rehnquist, JJ.). Minors 'are possessed of fundamental rights which the State must respect.' Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969). '[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.' In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). Accord, Planned Parenthood v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976). See generally Developments in the Law-The Constitution and the Family, 93 Harv.L.Rev. 1156, 1358-77 (1980).

(p 1042)

* * * * *

There is no issue of special vulnerability presented in this case.

(p 1043)

* * * * *

" * * * Even extending the vulnerability rationale to its broadest extent, it is impossible to conclude that a coin-operated amusement device presents a physical, mental, or moral threat under which 'the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.' Bellotti v. Baird, 443 U.S. at 635, 99 S.Ct. at 3044, citing McKeiver v. Pennsylvania, 403 U.S. at 550, 91 S.Ct. at 1988 (plurality opinion).

(p 1043)

* * * * *

The irrelevance of the 'critical decision' rationale is manifest on its face. To suggest that minors be permitted to express their views on divisive public issues, Tinker v. Des Moines Independent School District, and to secure abortions without parental consent, Bellotti v. Baird, Planned Parenthood v. Danforth, but that they can be barred

from making the 'critical decision of whether or not to deposit a quarter in a coin-operated amusement device is not a proposition that deserves serious consideration.

As for Justice Powell's third element, the role of parents, clearly this concern militates against the ordinance, not for it. Even if youthfulness is relevant in the case before us, parents, not the state, should decide whether their children are to enter coin-operated amusement centers. The state may not burden parents who decide to allow their children to enter the centers by requiring these parents to accompany their children. If a parent would rather shop or work and decides to trust Alladin's personnel or the child, that is the parent's prerogative. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 1541, 32 L.Ed.2d 15 (1972). Accord, Parham v. J.R., 442 U.S. 584, 602, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101 (1979). Thus for minors as for adults, the ordinance impermissibly and unconstitutionally infringes on freedom of association."

(pps 1043, 1044)

APPENDIX

SUPREME COURT OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACQUELINE WALKER,

SC: 74513
COA: 61924 (135 MA 267)
LC: 79-1143-AR

Defendant-Appellant.

AT A SESSION OF THE SUPREME COURT OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 14th day of February in the year of our Lord one thousand nine hundred and eighty-five. Present the Honorable

G. MENNEN WILLIAMS,

Chief Justice

CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,

Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be

reviewed by this Court.

STATE OF MICHIGAN

IN THE 37TH DISTRICT COURT

PEOPLE OF THE CITY OF WARREN,

Plaintiff,

-vs- No. 900,007

JACQUELINE ANN WALKER,

Defendant.

_____/

On July 20, 1979, Defendant's motion to dismiss with prejudice the complaint was denied by Hon. Don Binkowski, a judge of said Court.

(Docket entry; no opinion or order was signed)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs- No. 79-5676-AV

JACQUELINE WALKER,

Defendant-Appellant.

_____/

ORDER DENYING LEAVE TO APPEAL

Entered on August 24, 1979

This matter having come on to be heard upon the Defendant's Motion for Leave to Appeal, the Defendant-Appellant having filed briefs and the People having filed briefs in this matter and the Court having heard oral arguments of the attorneys for the parties,

IT IS HEREBY ORDERED that the Defendant's Motion for Leave to Appeal is denied.

/s/ Robert J. Chrzanowski
CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CITY OF WARREN,

Plaintiff-Appellee,

-vs-

No. 46928
L.C. # 79-5676 AV

JACQUELINE WALKER,

Defendant-Appellant.

_____/

Present the Honorable WILLIAM R. BEALEY, Presiding Judge; S. JEROME BRONSON, MICHAEL F. CAVANAGH, Judges.

In this cause an application for leave to appeal, a motion for immediate consideration, and a motion for stay of proceedings, are filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the

application be, and the same is hereby DENIED for failure to persuade the Court of the need for immediate appellate review.

IT IS FURTHER ORDERED that the motion for stay be, and the same is hereby DENIED.

The foregoing order was entered on September 18, 1979.

STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF WARREN,

Plaintiff-Appellee,

-vs-

SC: 63812
COA: 46928
LC: 79-5676-AV

JACQUELINE WALKER,

Defendant-Appellant.

_____/

AT A SESSION OF THE SUPREME COURT OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 25th day of September in the year of our Lord one thousand nine hundred and seventy-nine. Present the Honorable

MARY S. COLEMAN,

Chief Justice

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,

Associates Justices

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The emergency application for leave to appeal is also considered, and it is DENIED, because the Court is not persuaded that the questions presented should now be reviewed by the Court. The motion for stay becomes thereby moot, and it is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACQUELINE WALKER,

Petitioner,

-vs- Civil No. 9-73739

HON. DON BINKOWSKI, Judge
of the 37th Judicial District
Court of the State of Michigan,

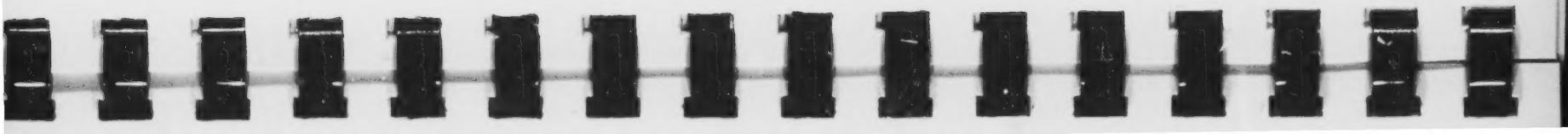
Respondent.
_____/

MEMORANDUM OPINION

Dated October 18, 1979

Petitioner, Jacqueline Walker, currently charged with three violations of Ordinance 30, Section 3-505 of the City of Warren, Michigan, brings this Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254. She contends that: (1) Ordinance 30, Sec. 3-505 denies her right to equal protection of the laws under Section One of the Fourteenth Amendment of the Constitution; (2) she was in custody on September 25, 1979, the date the petition was filed; and (3) she has exhausted her state remedies prior to seeking federal habeas corpus relief.

Petitioner initially sought to avoid trial on the ordinance violation by an attack upon constitutionality of Ordinance 30, Section 3-505 on grounds that the ordinance violated the equal protection clause of the Fourteenth Amendment to the Constitution. The ordinance bars persons operating an "amusement machine center" from allowing



minors under the age of seventeen into the "center" or allowing their use of mechanical amusement machines.

Petitioner sought, on June 27, 1979, to vacate charges of violations of Section 3-505 by a Motion to Dismiss with Prejudice. This motion was filed before Respondent, the Honorable Don Binkowski, Judge of the 37th District Court of the State of Michigan. Upon denial of the motion by Respondent on July 20, 1979, an appeal of the decision was immediately taken to the Macomb County, Michigan Circuit Court. The Circuit Court denied this appeal on August 20, 1979. Petitioner then sought appellate review by the Michigan Court of Appeals on the 18th of September, 1979, and the Supreme Court of Michigan on September 25, 1979. Both courts denied Petitioner's leave to appeal until after a trial on the merits in the 37th District Court. Petitioner then petitioned this Court, on September 25, 1979, for a Writ of Habeas Corpus for alleged violations of her rights

to equal protection of the laws by the enforcement against her of Ordinance 30, Section 3-505.

Petitioner contends that she was in custody when petition was filed and therefore meets the threshold "in custody" requirement of 28 U.S.C. §2254. Custody is determined when petition is filed. Carafas v. LaValles, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). In the instant case, this requires this Court to ascertain whether Petitioner was "in custody" on September 25, 1979, the day the petition was filed.

Custody is not limited to solely physical restraints upon the person (Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 554 (1963)) but rather is a question of sufficient supervisory control exercised over the person. Persons released on bond or on personal recognizance pending sentencing may be "in custody" within the meaning of the statute. Hensley v. Municipal Court, 411 U.S. 345, 349, 93 S.Ct. 1571, 36 L.Ed.2d 294

(1973); see generally 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §4262 (1978); and Developments in the Law - Habeas Corpus, 83 Harv. L. Rev. 1038, 1073-79 (1970). Nevertheless, the restraint on the liberty of Petitioner must be real and not solely economic or psychological. The critical element is supervisory control. Without such control habeas corpus relief may not issue from federal court. See 411 U.S. at 352, n. 10. The intent is to preserve the remedy of federal habeas corpus relief for only those cases of severe and actual restraints on the individual liberties of a petitioner. 411 U.S. at 350.

In the instant case Petitioner never alleges, as of September 25, 1979, being physically restrained, nor being on bond, nor being on personal recognizance. Her freedom of movement was absolute until her trial date. No court or governmental agency exercised any type of supervisory control over her person. She could come and go as she

pleased, unrestricted by state judicial officers.

Nonetheless, assuming Petitioner was "in custody" within the meaning of 28 U.S.C. §2254, do special circumstances in the instant case warrant this Court's intervention in the pending state criminal proceedings? In Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979), a petitioner, as in this case, sought federal habeas corpus relief prior to a criminal trial on the merits. The Court recognized the general principle, expressed in Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), that federal courts have the power to consider a habeas corpus petition to a state criminal charge in advance of a final judgment of conviction. 592 F.2d at 286. However, the Court conditioned intervention in a pending state judicial proceeding upon the "most extraordinary circumstances." Id.

Two such circumstances are alleged claims of double jeopardy and, perhaps,

prosecutorial vindictiveness. "One who sets up a defense under the double jeopardy clause to a pending criminal prosecution is asserting a constitutional immunity from having to undergo 'the risk or hazard of trial and conviction' and does not seek merely to avoid 'the ultimate legal consequences of [an adverse] verdict." Gully, supra, at 287. The Court differentiated between a verdict already given and the threat of an adverse verdict. Only the former is protected by the double jeopardy clause.

Double jeopardy claims were distinguished under the equal protection, ex post facto and due process clauses of the constitution, such as those made in the instant petition. None of the latter claims involve the "right not to be tried," 592 U.S. at 287, but rather the right to notice, regularity and impartiality of the state proceedings. These defects may be corrected after a trial on direct appeal within the state court system. See also Tyler v. Hall, 444 F.Supp. 104 (E.D. Mo. 1978).

In the absence of extraordinary circumstances, such as claims under the double jeopardy clause, e.g. Rivers v. Lucas, 477 F.2d 199 (6th Cir.), vacated and remanded on other grounds, 414 U.S. 896, 94 S.Ct. 232, 38 L.Ed. 139 (1973), federal courts do not act as overseers of state courts. Essentially, petitioner is seeking redress of allegedly erroneous state appellate court pre-trial rulings which she contends might lead to her conviction. However, if convicted, the State of Michigan provides adequate post-conviction appellate remedies through application by right to the Michigan Court of Appeals, 1963 GCR 806, and by leave to the Supreme Court of Michigan, 1963 GCR 852. The state courts, upon a conviction, will review and rule upon the alleged unconstitutionality of the municipal ordinance at issue. See Albertson v. Millard, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 972 (1953).

This Court declines to intervene in a pending state criminal proceeding and prefers

to permit the normal functioning of the state judicial process to decide the constitutionality of Ordinance 30, Section 3-505. Petitioner may not derail the pending state proceedings against her by resort to federal habeas corpus to litigate her constitutional defenses in advance of trial and possible conviction. It would be imprudent of this Court to wrest from state courts the primary responsibility for remedying constitutional violations or for deciding upon the constitutionality of state law, especially where both state and federal constitutional questions have been raised.

It is the policy of this and other federal courts to preserve the role of the state court in applying and enforcing the federal laws. To follow any other policy could isolate state courts from federal issues and infringe upon the principle of comity expressed in the requirement of exhaustion of state remedies under 28 U.S.C. 2254(b) and (c). Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct.

509, 30 L.Ed.2d 438 (1971). See also United States ex. rel. Parish v. Elrod, 589 F.2d 327, 329 (7th Cir. 1979).

For the foregoing reasons, Petitioner's application for a Writ of Habeas Corpus will therefore be denied. Respondent's request for attorney fees will also be denied.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACQUELINE WALKER,

Petitioner,

-vs- Civil No. 9-73739

HON. DON BINKOWSKI, Judge
of the 37th Judicial District
Court of the State of Michigan,

Respondent.

_____/

ORDER DENYING WRIT OF HABEAS CORPUS

Entered on October 18, 1979

This matter having come before the Court

on Petitioner's application for a Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254, and the Court being fully advised in the premises and for the reasons set forth in the attached Opinion,

IT IS ORDERED that the petition for a Writ of Habeas Corpus in the above-entitled case be, and the same is hereby DENIED. Respondent's request for attorney fees is also DENIED.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACQUELINE WALKER,

Petitioner,

-vs- Civil No. 9-73739

HON. DON BINKOWSKI, Judge
of the 37th Judicial District
Court of the State of Michigan,

Respondent.

_____/

ORDER DENYING CERTIFICATE
OF PROBABLE CAUSE

Entered on November 2, 1979

Petitioner, Jacqueline Walker, has filed a Notice of Appeal from an order of this Court dismissing her application for habeas corpus relief. Under Rule 22(b) of the Federal Rules of Appellate Procedure the District Judge must issue a certificate of probable cause or state the reasons why such certificate should not issue.

In a Memorandum Opinion filed by the Court on October 18, 1979, wherein the application for habeas corpus relief was denied, all of the allegations of the petitioner were determined to be without merit by this Court, and the said Opinion was terminated with the following:

> This Court declines to intervene in a pending state criminal proceeding and prefers to permit the normal functioning of the state judicial process to decide the constitutionality of Ordinance 30, Section 3-505. Petitioner may not derail the pending state proceedings against her by resort to federal habeas corpus to litigate her constitutional defenses in advance of

trial and possible conviction. It would be imprudent of this Court to wrest from state courts the primary responsibility for remedying constitutional violations or for deciding upon the constitutionality of state law, especially where both state and federal constitutional questions have been raised.

It is the policy of this and other federal courts to preserve the role of the state court in applying and enforcing the federal laws. To follow any other policy could isolate state courts from federal issues and infringe upon the principle of comity expressed in the requirement of exhaustion of state remedies under 28 U.S.C. 2254(b) and (c). Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). See also United States ex. Rel. Parish v. Elrod, 589 F.2d 327, 329 (7th Cir. 1979).

For the foregoing reasons, Petitioner's application for a Writ of Habeas Corpus will therefore be denied. Respondent's request for attorney fees will also be denied.

The request for a certificate of probable cause is denied.

THOMAS P. THORNTON
United States District Judge

STATE OF MICHIGAN

IN THE 37TH DISTRICT COURT

PEOPLE OF THE CITY OF WARREN,

Plaintiff,

-vs- No. 900,007

JACQUELINE ANN WALKER,

Defendant.

_____/

On December 14, 1979, Defendant was found guilty as charged ("allow Minor to oper Mach.") in violation of City of Warren Ordinance # 3-505 after a non-jury trial by the Hon. Don Binkowski, District Court Judge.

(Docket entry; no opinion or order was signed).

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs- No. 79-1143 AR

JACQUELINE WALKER,

Defendant-Appellant.

_____/

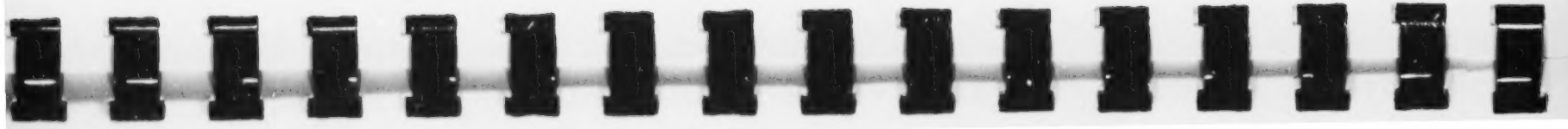
OPINION

Dated May 7, 1980

During the oral arguments on this matter, counsel for appellant requested a written opinion on whether the term "law" as used in MCL 27.2302(a) encompasses municipal ordinances. As the parties are now aware, this Court believes that it does. This written opinion is being issued solely for the convenience of the parties and also for the appellate courts in the event of an appeal.

The subject statute reads, pertinently:

"Except where permitted by



> law, a person shall not (a) deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accomodations of a place of public accomodations or public service because of....age." (emphasis added)

The above statute is a part of the Elliot-Larsen Civil Rights Act. MCL 27.2101 et seq. That act does not define the word "law" as it is used in the context thereof.

In stating that ordinances are not law, appellant draws upon the provisions of Article VII, Section 22 of the Michigan Constitution of 1963, which provides that:

> "Each city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government subject to the constitution and law."

Appellant contends that the inclusion of the word "law" in this provision indicates an intent to construe ordinances as being somewhat less than law. This is not so.

It does not require specific citation to prove that the use of the word law in the subject article and section connotes nothing more

than the use of a synonym for the word "statute" or "statutes." A plethora of laws and constitutional provisions use this form of expression.

Moreover, the contention that an ordinance is not a law is a legal and logical absurdity. Black's Law Dictionary, Revised Fourth Edition, p 1028 defines a law, inter alia as;

> "That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences is a 'law'".
> (Emphasis added)

Moreover, established case law conclusively indicates that ordinances are laws. See Norfolk & Western Ry. Co. v White 160 SE 218, 221 (Va.), and State v Police Court of City of Deer Lodge, 283 P. 430, 433 (Mont.). Michigan precedent establishes that city charter provisions are "law. 288 Mich 660 (19).

Based on the foregoing authorities among others, it is readily apparent that the term

"law" as used in MCL 37.2303 (a) encompasses ordinances.

An order shall enter consistent with this opinion.

John G. Roskopp
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs-

No. 79-1143-AR
Lower Court
No. 302 226 (900007)

JACQUELINE WALKER,

Defendant-Appellant.

ORDER AFFIRMING CONVICTION

Entered on May 7, 1980

The Defendant having been convicted in the 37th District Court for allowing minors to operate pinball machines in violation of the City of Warren ordinance.

The Defendant having appealed said

conviction to this Court and the Court having reviewed the transcript and briefs submitted by both parties and having heard oral arguments on April 21, 1980 and being fully advised of the premises thereof.

IT IS HEREBY ORDERED that the conviction of the Defendant is hereby affirmed and that the sentence imposed by the District Court be carried out.

/s/ John G. Roskopp
HONORABLE JOHN G. ROSKOPP
CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs-

No. 79-1143-AR
Lower Court
No. 302 226 (900007)

JACQUELINE WALKER,

Defendant-Appellant.

ORDER DENYING MOTION FOR RECONSIDERATION

Entered on June 5, 1980

This Court entered an Order dated May 7, 1980, affirming the conviction of the Defendant JACQUELINE WALKER. The Defendant, JACQUELINE WALKER, having filed a Motion for Rehearing of the Order Affirming Conviction on May 27, 1980; and the Attorney for the Appellant, having appeared in Court and argued three issues not covered in the Court's opinion.

1. Motion to Strike Appellee's Facts, which were included in the Appellee's brief in the argument portion.

2. That the Appellee, the City of Warren, has no statutory power to enact said ordinance.

3. That the ordinance is unconstitutional as it is a denial of equal protection of the law because the ordinance does not apply to a bowling alley.

This Court having heard the arguments by the Attorney for the Appellant and the Attorney for the Appellee, and being fully advised to the premises thereof,

IT IS HEREBY ORDERED that the Motion for Reconsideration of the Order Affirming the

Conviction be Denied.

/s/ John G. Roskopp
THE HONORABLE JOHN G. ROSKOPP
CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs- Docket No. 52702
L.C. No. 79-1143-AR

JACQUELINE WALKER,

Defendant-Appellant.

/

Present the Honorable Donald E. Holbrook, Jr., Presiding Judge; Glenn S. Allen, Jr., Barbara B. MacKenzie, Judges

In this cause an application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

The foregoing order was entered on April 3, 1981.

SUPREME COURT OF MICHIGAN

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs-

SC: 67070
COA: 52702
LC: 79-1143-AR

JACQUELINE WALKER,

Defendant-Appellant.

_____/

AT A SESSION OF THE SUPREME COURT OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of December in the year of our Lord one thousand nine hundred and eight-one. Present the Honorable

MARY S. COLEMAN,

Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.

Associate Justices

On order of the Court, the motion to hold

the application for leave to appeal in abeyance is considered, and it is DENIED. The application for leave to appeal is considered and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals for consideration as on leave granted.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE WALKER,

Petitioner-Appellant,

-vs- No. 79-8107

HONORABLE DON BINKOWSKI,
JUDGE OF THE 37TH JUDICIAL
DISTRICT COURT OF MICHIGAN,

Respondent-Appellee.

_____/

ORDER

Entered on June 23, 1982

Construing the certified record as an application for a certificate of probable cause,

It is ORDERED that the certificate of

probable cause is denied for the reasons set forth in the district court's order of November 2, 1979.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs- No. 61924
L.C. No. 79-1143-AR

JACQUELINE WALKER,

Defendant-Appellant.

_____/

Present the Honorable Robert J. Danhof, C.J. Presiding Judge; William R. Beasley, Walter P. Cynar, Judges.

In this cause a motion to permit new grounds for appeal has been filed by the defendant-appellant and an answer in opposition thereto having been filed, and due consideration thereof being had by the Court,

IT IS ORDERED that the motion to permit new ground for appeal be, and the same is hereby GRANTED.

Judge Cynar would deny.

The foregoing order was entered on July 21, 1982.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellee,

-vs- No. 61924

JACQUELINE WALKER,

Defendant-Appellant.

_____/

OPINION

The Opinion is dated June 18, 1984. BEFORE: T.M. Burns, P.J., V.J. Brennan and M.H. Wahls, JJ. The Opinion is by M.H. Wahls.

This case presents the question of whether a municipality may lawfully prohibit its youths from engaging in the now popular pastime of playing electronic video games.

We find the matter to be somewhat novel and of no small constitutional importance. The factual background is comparatively straightforward.

The City of Warren, a Home Rule City, MCL 117.1 et seq; MSA 5.2071 et seq, enacted legislation which under the general licensing rubric prohibited youths under the age of 17 from any public association or involvement with electronic video games without their parent or guardian being present:[1]

> "Prohibitions and restrictions.--(1) It shall be unlawful for any licensee, employee, agent or servant of the licensee to permit a minor prior to his (her) 17th birthday to enter, loiter, remain, congregate, or play any mechanical amusement in an amusement machine center unless accompanied by a parent or guardian.
>
> (2) Nothing herein contained shall be construed as permitting the issuance of a license for any slot machine or as legalizing any coin-operated machine or device in which is incorporated any gambling feature, and all use thereof for gambling of any kind is prohibited.
>
> (3) It is unlawful for any person holding a licensee (sic) under this chapter to permit the operation of a device, as defined in Section 3-501, between the hours of 2:00 a.m.

and 6:00 a.m. of any day.

(4) Nothing in this chapter shall be construed as prohibiting the keeping and use of pool tables, billiard tables, bowling alleys, shuffleboards, or other licensed amusements and their usual appurtenances in places duly licensed and operated under applicable ordinances of the city." Warren City Ordinance 30, Sec. 3-505.

Defendant, Jacqueline Walker, the owner of Walker's Pinball Arcade, catered to youths within the City of Warren. On January 18, 1979, two police officers observed several individuals in defendant's arcade who appeared to be minors. Upon entering and questioning the youths, the officers ascertained that at least six youths were under 17 and were not accompanied by a parent or guardian. The officers issued defendant a citation charging her with "allowing a minor to operate mechanical machines." Following a bench trial in district court, defendant was found guilty of violating the ordinance and assessed a fine and costs in the amount of $500. On appeal, the Circuit Court affirmed. Thereafter, defendant sought leave to appeal to this Court,

which was denied. However, the Supreme Court remanded the case to this Court for consideration as on leave granted.

Defendant challenges the validity of the ordinance on the following grounds:

1. The ordinance restricts the exercise of fundamental First Amendment rights of expression and association.

2. The ordinance violates federal and state constitutional guarantees of equal protection; and

3. The ordinance violates the prohibition against age discrimination in the Elliot Larsen Civil Rights Act, MCL 37.2101 et seq; MSA 3.548 (101).

I

Defendant asserts that the ordinance restricts, without compelling reason, the right of persons under the age of 17 to associate by prohibiting them from coming to the game center unless accompanied by an adult. Defendant has standing to raise the issue of infringement of First Amendment rights of

potential customers. See e.g., Carey v Population Service International, 431 US 678; 97 S Ct 2010; 50 L Ed 2d 574 (1976), reh den, 429 US 1124; 97 S Ct 1161; 51 L Ed 2d 574 (1976). The case or controversy requirement of Art. III of the United States Constitution is satisfied since the ordinance directly applies to defendant. Defendant is "obliged to either heed the statutory [prohibition], thereby incurring a direct economic injury through the destruction of [its] market, or to disobey the statutory command and suffer legal sanctions". Carey v Population Service International, supra, at 683.

Were this Court to hold that playing pinball or video games is a fundamental right, it is clear that the City of Warren would then have the burden of justifying the restriction with an interest sufficiently compelling to outweigh the impermissible effect of the ordinance. Manistee Bank & Trust Co, 394 Mich 655, 668; 232 NW2d 636 (1975). Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed2d 147 (1972).

Further, the existence of a compelling interest may yet be insufficient if we find that the ordinance is too restrictive under the circumstances. Shelton v Tucker, 364 US 479; 81 S Ct 247; 5 L Ed 231 (1960).

We have searched in vain for a sustainable theory upon which to base such a ruling. However, the ordinance in this case must pass constitutional muster.[2]

The right of association, is not expressly recited in or created by the language of the First Amendment of the Constitution to the United States. But it has long been recognized as implicit within and emanating from the rights expressly guaranteed. The Fourteenth Amendment mades the same applicable to the States. Buckley v Valeo, 424 US 1; 96 S Ct 612; 46 L Ed2d 659 (1976). Healy v James, 408 US 169; 92 S Ct 2338; 33 L Ed2d 266 (1972). The right of association has received recognition in connection with group associations. See 33 L Ed2d 865 (1973). However, it has never been held to apply to the right of an

individual to associate for purposes purely social in character.

The criterion established thus far appears to protect the right to associate when the expressive conduct around which the association is centered is accorded protection by the First Amendment. Cousins v Wigoda, 419 US 477; 95 S Ct 541, 42 L Ed2d 595 (1975). NAACP v Button, 371 US 415, 83 S Ct 328, 9 L Ed2d 405 (1963). Serbian Eastern Orthodox Diocese v Milivojevich, 426 US 696; 96 S Ct 2372, 49 L Ed 2d 151 (1976). Kedroff v St. Nicholas Cathedral, 344 US 94, 73 S Ct 143, 97 L Ed 120 (1952). Thus, a group which assembles for for purposes constitutionally protected under the freedom of expression may properly require a compelling interest when the government seeks to interfere with or discourage the group's pursuit.

Defendant has not demonstrated that the communicative elements of playing video games are entitled to constitutional protection. We are not prepared on these facts to so hold.

Therefore, the ordinance which restricts association for this purpose is not violative of the First Amendment. We adopt the rationale of the Massachusetts Supreme Court in Marshfield Family Skateland, Inc v Town of Marshfield, 389 Mass 436; 450 NE2d 605 (1983), appeal dismissed 104 S. Ct 475 (1983):

> "[A]lthough entertainment may be entitled to First Amendment protection, 'to gain protected status, that entertainment must be designed to communicate or express some idea or some information' . . . [I]t appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential." 450 NE2d at 609.[3]

II

Defendant next asserts that the application of the 17 year old age requirement to amusement machine centers violates the federal and state constitutional guarantees of equal protection. US Const, AM XIV; Const 1963, Art 1, § 2.

Equal protection cases are analyzed under a two-tiered approach:

> "If the interest is 'fundamental' or the classification 'suspect', the court applies a 'strict scrutiny' test requiring the state to show a 'compelling interest which justifies the classification. Rarely have courts sustained legislation subjected to this standard of review.
>
> "Other legislation, principally social and economic, is subjected to review under the traditional equal protection test. The burden is on the person challenging the classification to show that it is without reasonable justification. It has been said that '[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it'. A classification will stand unless it is shown to be 'essentially arbitrary'. Few statutes have been found so wanting in 'rationality' as to fail to satisfy the 'essentially arbitrary' test." Manistee Bank & Trust Co v McGowan, 394 Mich 655, 668; 232 NW2d 636 (1975) (footnotes ommitted).

The equal protection guaranty of the Michigan Constitution is applied under the same standards as the corresponding provision of the Federal Constitution. Fox v Employment Security Commission, 379 Mich 579; 153 NW2d 644 (1967).

Age is not a suspect classification for

equal protection purposes. Massachusetts Board of Retirement v Murgia, 427 US 307, 313-314; 96 S Ct 2562; 49 L Ed 2d 520 (1976), People v Perkins, 107 App 440, 443; 309 NW2d 634 (1981). Nor, of course, are mechanical amusements, or amusement machine centers a suspect classification. Defendant argues, however, that the classifications created by the ordinance as to age and mechanical amusements are arbitrary.

The City offers the following in its brief on appeal as justification for the ordinance:

> "The ordinance in question was passed because children were spending their lunch money on the pinball machines instead of buying lunch. Some Children were 'borrowing lunch money from other children to play the pinball machines. The term 'borrowing' includes strong-arm robbery. Children were stealing money from their parents. These instances occurred when pinball machine arcades were located close to schools. On occasion where the amusement center was located close to other stores, the neighboring store owners complained that at noon time and after school there were so many children

> gathering around that customers could not get into their stores. With parents and school officers complaining, something had to be done to regulate the amusement centers.
>
> * * *
>
> " * * * The lengthy police reports and citizen complaints documenting evidence of vandalism, truancy, drug and alcohol abuse, and irresponsible use of money, coupled with complaints of noise, littering, traffic problems and an increased crime and trespassing incidents in neighboring areas and businesses clearly demonstrates a deterioration of certain public interests."

The City also alleged that deleterious psychological effects result from playing video and video and pinball games, such as gambling compulsions and addiction to playing such games.

We do not believe defendant has sustained her burden of showing the ordinance in question is without any reasonable justification. We disagree that the ordinance must be struck down because the City chose to treat minors and pinball or video machine arcades differently than adults and bowling alleys. Cf. People

v Palazzo, 62 Mich App 140; 233 NW2d 216 (1975) The current popularity of amusement arcades, particularly among young people, has clearly created problems unique to such businesses which the City of Warren has attempted to minimize by the implementation of the Ordinance under attack here. The classifications in the ordinance are not "essentially arbitrary."

III

Finally, defendant's argument that the ordinance violates the prohibition against age discrimination in the Elliot-Larsen Civil Rights Act, MCL 37.2101 et seq.; MSA 3.548 (101) is void of merit. Section 102 of the statute prohibits age-based discrimination in places of public accommodation "except where permitted by law." The term "law" includes the entire body of law, including, it is clear, validly passed municipal ordinances, See Cheeseman v Multi Cinema, Inc, 108 Mich App 428, 431; 310 NW2d 408 (1980).

Also without merit is defendant's

contention that the City had no authority to enact the ordinance. The City of Warren had constitutional authority, Const 1963, Art 7, §22, as well as statutory authority derived from the Home Rule Cities Act, MCL 117.1 et seq.; MSA 6.262 et seq. See MCL 117.4i (4); MSA 5.2082.

Defendant's conviction is hereby affirmed.

/s/ T.M. Burns
/s/ V.J. Brennan
/s/ M.H. Wahls

FOOTNOTES

1. The penalty provisions for violation of the ordinance are set forth below:

> Sec. 3-515 Penalty.--Any person who shall violate any of the provisions of this chapter shall be penalized in accordance with Sections 1-110 and 1-111 of the Warren Code of Ordinances.
>
> Sec. 1-110 General penalty.--Whenever in this code or any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense, or whenever in this code or such ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, the violation of any such provision by any person shall, upon

FOOTNOTES CONTINUED

conviction, be punished by a fine not exceeding $500.00 or imprisonment for a term not exceeding 90 days, or both, except whenever a specific penalty is otherwise provided.

2. In our judgment, the facts of this case present a classic "Trouble in River City" scenario (depicted in the broadway musical The Music Man), wherein popular pastimes of youths such as bowling, billiards, roller skating and pinball machines are singled out as activities which exert immoral influences on the youths. Establishments which catered to such activities were defined a common nuisance:

> "The 'hurt' or injury to the community, which has occasioned bowling alleys kept for gain and common use to be regarded as common nuisances, arises from their tendency to withdraw the young and inconsiderate from any useful employment of their time, and to subject them to various temptations. . . . Clerks, apprentices and others are induced, not only to appropriate to them hours, which should be employed to increase their knowledge and reform their hearts, but too often to violate higher moral duties to obtain means to pay for the indulgence. Other bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular and industrious habits, which are the basis of a prosperous and happy community, are frequently impaired or destroyed. Bowling alleys without doubt may be

> resorted to by many persons without such injurious results. The inquiry is not what may be done at such places without injury to persons of fixed habits and principles, but what has been in the experience of man, their general tendency and result. The law notices the usual effect, the ordinary result of a pursuit or course of conduct, and by that decides upon its character. It need not be the necessary and inevitable result of a bowling alley kept for gain and common use, that it is thus injurious to the community, to make it a common nuisance."

State v Haines, 30 Me 65, 75-76; (1849). Quoted in Roy v Inhabitants of City of Augusta, 387 A2d 237, 238-239 (178). In Michigan, see Devereaux v Township Board, 211 Mich 38; 177 NW 967 (1920). Bloss v Paris Township, 380 Mich 466; 157 NW2d 260 (1968). Franchise Realty Corp v Detroit 368 Mich 276; 118 NW2d 258 (1962). See also 100 ALR3d 252. In most instances, the moral stigma disappears as the interests of the youths change and as the mores of the community change (usually as the minors become responsible adults). We are not convinced, indeed, we feel strongly that other less restrictive alternatives are available to the City of Warren to help control the truancy of its youths. Unfortunately, this observation does not reach the constitutional question. The jurisdictions that have examined similar ordinances concur that they are not unconstitutional. See Aladdin's Castle, Inc v Village of North Riverside, 66 Ill App 3d 542; 383 NE 2d 1316 (1978). Rothner v City of Des Plaines, 554 F Supp 465 (1981). Marshfield Family Skateland, Inc v Town of Marshfield, 389 Mass 436; 450 NE2d 605 (1983), appeal dismissed 104

S. Ct 475 (1983). Compare Aladdin's Castle, Inc v City of Mesquite, 630 F2d 1029 (Ca 5 1980) rev'd in part and remanded, 455 US 283; 102 S. Ct 1070, 71 L Ed2d 152 (1982) rehearing 701 F2d 524 (1983).

3. We concur in the observation by the Marshfield Court that "in the future video games which contain sufficient communicative and expressive elements may be created." 450 NE2d at 609-610. However, defendant in the present case does not argue that any particular video game in her establishment merits protection. Rather, defendant argues that video games are within the genre of entertainment forms protected by the First Amendment. It is this assertion that we reject.

SUPREME COURT OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACQUELINE WALKER,

SC: 74513
COA: 61924 (135 MA 267)
LC: 79-1143-AR

Defendant-Appellant.

AT A SESSION OF THE SUPREME COURT OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 14th day of February in the year of our Lord one thousand nine hundred and eighty five. Present the Honorable

G. MENNEN WILLIAMS,

Chief Justice

CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,

Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

IN THE SUPREME COURT OF THE UNITED STATES

JACQUELINE WALKER,

Appellant,

-vs- No._____

CITY OF WARREN,

Appellee.

_____/

NOTICE OF APPEAL

TO: Hon. Frank J. Kelley
Attorney General of the
State of Michigan
The Law Building
Lansing, Michigan 48913

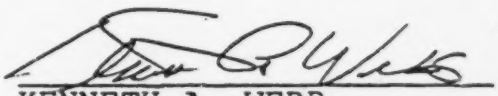
and

Mr. John J. Murray
Assistant City Attorney
City of Warren
29500 Van Dyke
Warren, Michigan 48093

PLEASE TAKE NOTICE THAT the above-named Appellant Jacqueline Walker hereby takes an appeal from the final order of the Supreme Court of Michigan entered on February 14, 1985 denying her application for leave to appeal the final decision of the Court of Appeals

of Michigan filed on June 18, 1984 affirming Appellant's conviction of violating Ordinance Sec. 3-505 (1) of the City of Warren, Michigan after a non-jury trial by the Honorable Don Binkowski, District Judge.

The statute under which this appeal is taken is 28 U.S.C. § 1257 (2).



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Dated: May 15, 1985